United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-5020

United States Court of Appeals
FOR THE SECOND CIRCUIT

B pl.

In the Matter
of
ISRAEL-BRITISH BANK (LONDON) LIMITED,
Bankrupt.

ISRAEL-BRITISH BANK (LONDON) LIMITED,
Appellant,

FEDERAL DEPOSIT INSURANCE CORPORATION
as successor in interest to Franklin National Bank,
and
BANK OF THE COMMONWEALTH,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE BANK OF THE COMMONWEALTH

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Preliminary Statement

This is an appeal by Israel-British Bank (London) Limited ("IBB") from an order of Honorable Morris E. Lasker, United States District Judge, dated October 10, 1975 (A 52-89),* amended on October 17, 1975 (A 90), which reversed

* References designated (A) are to pages in the Joint Appendix. Judge Lasker's opinion is reported at 401 F. Supp. 1159.

an order of Honorable John J. Galgay, Bankruptcy Judge, dated December 19, 1974 (A 36-51), and dismissed the voluntary petition in bankruptcy of IBB filed on September 23, 1974.

Statement of Issue Presented for Review

In view of the express exclusionary language with respect to a "banking corporation" contained in Section 4(a) of the Bankruptcy Act (11 U.S.C. §22), did the Bankruptcy Court have jurisdiction to entertain the voluntary petition filed on behalf of Israel-British Bank (London) Limited, a foreign banking corporation?

Statement of the Case

Appellant IBB is a banking corporation organized and existing under the laws of the United Kingdom and maintaining its principal place of business in London, England (A 4). Appellee Bank of the Commonwealth ("Commonwealth") is a banking corporation organized and existing under the laws of the State of Michigan (A 26).

On April 16, 1974, Commonwealth advanced the sum of $500,000 to IBB for a period of 90 days, such funds being made available to IBB, at its direction, in New York City. When IBB failed to make payment of the loan at its maturity on July 15, 1974, Commonwealth promptly commenced an action in the Southern District of New York under Docket No. 74 Civ. 3101 (TPG) for the recovery of the monies loaned, together with interest due thereon. Jurisdiction over IBB was obtained by attaching certain of its assets having a situs within this district (A 27). Upon the failure of IBB to appear or answer, Commonwealth obtained a judgment against it on or about September 11, 1974, in the sum of $519,923.90 (A 34).

Before Commonwealth could compel payment of the monies which had been attached by the Marshal in satisfaction of its judgment, and on September 23, 1974, a voluntary petition in bankruptcy (A 4) was filed in the Southern District of New York on behalf of IBB, and it was adjudicated a bankrupt on that date. As a result of the foregoing, Commonwealth has been, and pending this appeal continues to be, barred from collecting the monies due it or from taking any action or proceeding to realize on its judgment.

On October 2, 1974, Commonwealth moved in the Bankruptcy Court for an order vacating and setting aside the adjudication of bankruptcy made on September 23, 1974, and dismissing the voluntary petition (A 24). Bankruptcy Judge Galgay ruled from the bench on October 22, 1974, and subsequently confirmed in a written opinion dated December 19, 1974, that Commonwealth and its co-movant Franklin National Bank had standing to challenge the jurisdiction of the court (A 41-42). At the same time, Judge Galgay denied the motions to dismiss (A 51).

Upon Commonwealth's appeal from this determination, the United States District Court, in an opinion dated October 10, 1975, amended October 17, 1975, reversed the decision of the Bankruptcy Court, and dismissed IBB's voluntary petition.

The District Court held that Section 4(a) of the Bankruptcy Act (herein the "Act"), excluding banking corporations from bankruptcy jurisdiction, applied to foreign as well as domestic banking corporations. There was, the Court ruled, nothing in the statute, its legislative history, the purposes of the exception, or the cases and other authorities which overrode the obvious and ordinary meaning of the words "banking corporation" as they were used in the provision exempting such corporations from the provisions of the Act. Finding no support for IBB's argument that foreign banking corporations were to be afforded dif-

ferent treatment from domestic banking corporations under the Act, the Court declined to judicially legislate such a distinction, and held that IBB, as a banking corporation, was not entitled to avail itself of the benefits of the Act as a voluntary bankrupt

POINT I

The Bankruptcy Act specifically excepts from its provisions all banking corporations, without qualification, and the Bankruptcy Court is without jurisdiction to entertain a voluntary petition filed by such a corporation, regardless of whether it be foreign or domestic.

Section 4(a) of the present Act provides that:

> "Any person, *except a* municipal, railroad, insurance, or *banking corporation* or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt." (Emphasis added.)

Banking corporations are not only expressly excepted from the provisions governing voluntary bankruptcy under Section 4(a), but also those relating to involuntary bankruptcy under Section 4(b), as well as corporate reorganization under Chapter X and arrangement under Chapter XI. Thus, Congress has adopted a comprehensive legislative program which, on its face, evidences a clear intent to exclude any "banking corporation" from the benefits of the Act.

The word "person" is defined in Section 1(23) of the Act to include a corporation, and the word "corporation" is defined in Section 1(8) of the Act to include

> "* * * all bodies having any of the powers and privileges of private corporations not possessed by

> individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association * * *."

Nothing to be found elsewhere in the Act would suggest that the term "banking corporation" as used in Section 4(a) was designed by Congress to be limited to "domestic" corporations. On the contrary, the definition of "corporation" contained in Section 1(8) was drafted in language broad enough to embrace both "foreign" and "domestic" corporations, without distinction of any kind.

In the oft-cited case of *Gamble* v. *Daniel*, 39 F.2d 447 (8th Cir. 1930), *appeal dismissed*, 281 U.S. 705 (1930), *cert. den.*, 282 U.S. 848 (1930), the court defined the expression "banking corporation" in sweeping terms to include "corporations which were authorized by the laws of their creation to do a banking business" (at p. 450).

Since 1898 the Act has been made applicable to foreign persons and corporations having property located in the United States by virtue of the provisions of Section 2.* Its terms have been consistently applied to such foreign individuals and corporations under precisely the same standards as they have been applied to nationals or to domestic corporations. For example, in *In re Berthoud*, 231 F. 529 (S.D.N.Y. 1916), *appeal dismissed*, 238 F. 797 (2d Cir. 1916), the general definition of an act of bankruptcy was held to relate to a non-resident alien possessing property in this country in the same fashion as it would have related to a United States citizen.

IBB concedes (Br. at p. 34) that

> "Congress at the time of the enactment of the exceptions to Section 4 also had in mind foreign corporations."

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* The three previous Bankruptcy Acts—the Act of 1800 (2 Stat. 19), the Act of 1841 (5 Stat. 440) and the Act of 1867 (14 Stat. 517)—had all been restricted in their application to residents of the United States.

If this be true, then the only conclusion to be reached is that Congress intended the exclusion of banking corporations from bankruptcy jurisdiction under Section 4 of the Act to apply equally to foreign and domestic banking corporations. Certainly no language in the Act indicates a contrary intent. Therefore, since IBB in the very first paragraph of its petition (A 4) acknowledges itself to be "a corporation * * * engaged in the banking business," the Bankruptcy Court need and should have gone no further in order to conclude that it had no jurisdiction over the petitioner.

A. To construe the exceptions in Section 4(a) to apply solely to domestic corporations creates an inconsistency in the wording of the Act.

An interpretation of Section 4(a) of the Act which would permit a foreign banking corporation to file a voluntary petition in bankruptcy would probably mean that an involuntary petition may also be filed against such a corporation under Section 4(b). That construction would, however, create an inherent inconsistency in the wording of the latter Section. As amended in 1910, and as it reads today with only minor change, Section 4(b) provides, *inter alia*, as follows:

> "* * * any moneyed, business, or commercial *corporation*, except a municipal, railroad, insurance, or banking *corporation* * * * may be adjudged an involuntary bankrupt * * *" (36 Stat. at 838).

To hold that a foreign banking corporation is amenable to federal bankruptcy proceedings requires that the word "corporation" as first used in the quoted sentence be construed to *include* foreign corporations, while the word "corporation" as used for the second time in that same sentence must be read to relate only to *domestic* corporations. In

other words, in order to assume jurisdiction over an involuntary petition filed against a foreign banking corporation it becomes necessary for the word "corporation" to be read one way in the inclusive phrase, and another way in the exclusive phrase.

Since Section 1(23) of the Act defines the word "person" to include a corporation, except where otherwise specified, a like, although somewhat less apparent, inconsistency exists in Section 4(a) if the term "banking corporation" is construed as applying to domestic corporations alone.

When faced with a similar situation in determining whether a public warehouse was a "public utility" within the meaning of Section 203(c) of the Federal Emergency Price Control Act, exempting public utilities from the provisions of the Act, Mr. Justice Jackson said in *Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, 149-50 (1944):

> "Legislative history is ambiguous, and in no instance was attention directed to the particular problem presented here as to the scope of the term 'public utility'. But the phrase was used to measure inclusions as well as exemptions * * *. It is difficult to believe that a different scope was intended to be given to the same words in different sections of the legislation. The use of the same generic term in these different contexts indicates that it had no narrower connotation and should receive no stricter interpretation in the exemption merely because used to define an exemption."

It is submitted that only a forced and wholly untenable interpretation of the unambiguous language of Section 4(b), as amended in 1910, would permit of the inconsistency in which the conclusion proposed by IBB would necessarily result. If, therefore, the language of Section 4(b) cannot be reconciled with the allowance of *involuntary* proceedings

involving foreign banking corporations, it follows that such a corporation cannot avail itself of a *voluntary* proceeding under Section 4(a).

B. Where it appears on the face of the petition that a corporation is within the excepted class, the authority of the Bankruptcy Court to act is absolutely at an end.

The burden of demonstrating the existence of bankruptcy jurisdiction rests squarely on IBB. As stated in *Kheel* v. *Port of New York Authority*, 457 F.2d 46, 48 (2d Cir. 1972):

> "The burden of proving jurisdictional prerequisites lies on the party who seeks the exercise of jurisdiction in his favor. '[I]nquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf * * * [H]e must carry throughout the litigation the burden of showing that he is properly in court.' *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 785, 80 L. Ed. 1135 (1936)."

In this case, that burden was not, and could not be, discharged.

In *In re Specific States Savings & Loan Co.*, 27 F. Supp. 1009, 1011 (S.D. Cal. 1939), the District Court, in a case involving a building and loan association, made clear the legal effect of the exclusionary language contained in Section 4, in the following language:

> "It is very significant that the law as it stands now, and as it has stood since 1910, excepts specifically certain corporations from the purview of the Bankruptcy Act. The effect of the exception is this: Whereas, under the law prior to the 1910 amendment, a factual situation arose which gave the court of bankruptcy the right to inquire into the nature of a corporation, so as to determine whether it did or did not have jurisdiction, that power was removed

> by the amendment of 1932 [the date that building and loan associations, in issue in the case, were added to the 1910 list of excepted corporations]. From that time on, *where it appears on the face of a petition that a corporation is in the excepted class, the authority of the court to act is absolutely at an end*" (Emphasis added).

That case, in turn, relied on *Vallely* v. *Northern Fire and Marine Insurance Co.*, 254 U.S. 348 (1920), where the Supreme Court had stated (at 355-56):

> "It will be observed, therefore, that the Act of 1898 made jurisdiction depend upon an inquiry of fact and necessarily jurisdiction was conferred to make the inquiry, and pronounce judgment according to its result. * * * [But] [t]he Act of June 25 1910, which covers the present proceeding is peremptory in its prohibition. It excludes, by § 4-*a*, insurance corporations from the benefits of voluntary bankruptcy, and by subdivision *b* prohibits them from being adjudged involuntary bankrupts. *The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations, and necessarily there is no power in the District Court to include them.* In other words, the policy of the law is to leave the relation and remedies of 'municipal, railroad, insurance, or banking' corporations to their creditors and their creditors to them, to other provisions of law. * * * For a court to extend the act to corporations of either kind [municipal or insurance corporations] is to enact a law, not to execute one" (Emphasis added).

It is thus clear from the face of the statute, as supported by court interpretation, that the Bankruptcy Court had no jurisdiction of the subject matter of the instant proceeding and that the petition of IBB failed to state a claim upon which relief could be granted.

The maxim favoring a narrow construction of statutory exceptions, cited by IBB at pages 7-8, cannot be invoked to alter the plain meaning of an exception which is clear on the face of the statute, or to vary the intent of the law as evidenced by its express language. In *Interstate Commerce Commission* v. *Service Trucking Co., Inc.*, 186 F.2d 400 (3rd Cir. 1951), the court said (at page 403):

> "The Commission advances the doctrine requiring strict construction of exemptions to general regulations as a reason for adopting its interpretation. This rule should not be applied to defeat the intent of the law."

Likewise, in *Interstate Commerce Commission* v. *Yeary Transfer Co., Inc.*, 104 F. Supp. 245 (E.D. Kty. 1952), *aff'd*, 202 F.2d 151 (6th Cir. 1953), it was made clear that:

> "The rule of strict construction of exemptions upon which plaintiff relies should not be applied to the extent of requiring a result contrary to the clear intent of the law" (at p. 247).

In the instant case, to limit the term "banking corporation" by reading it as if it were prefaced by the word "domestic" would do violence to the language which Congress has seen fit to employ and thereby defeat the clear intent of a law designed to restrict the bankruptcy jurisdiction of the federal courts.

C. Reference to the "objectives" of the Bankruptcy Act in situations where it applies is irrelevant to a determination of jurisdiction in the first instance.

In justification of the radical surgery which it proposes to perform on Section 4(a) by construing the exceptions to apply only to "domestic" corporations, IBB resorts to the equitable objectives of bankruptcy proceedings generally

(pp. 4-9). That a fundamental objective of the Act, in situations to which it applies, is equitable distribution of assets among creditors is not disputed. But that consideration, presupposing as it does the existence of the very jurisdiction which is here in issue, can have no application to corporations specifically excluded from the operation of the Act. The purpose of *exempting* banking corporations from the provisions of the Act was not to achieve equality of distribution, but rather to avoid application of the bankruptcy machinery to situations to which it was deemed inappropriate.

Where the burden of demonstrating the existence of federal bankruptcy jurisdiction has not been met, the courts have usually followed a policy which favors local creditors who have attached local assets of foreign corporations. For example, *In re People of the State of New York (The City Equitable Fire Ins. Co., Ltd.)*, 238 N.Y. 147 (1924) presented a factual situation not dissimilar to the one at bar. City Equitable was an English insurance corporation in the process of being wound up pursuant to the British Companies Act. Although a British liquidator had taken possession of the assets of the corporation, it was held that the orders and decrees of the British court were without force or effect in New York, the Court of Appeals stating (at p. 152):

> "Notwithstanding what has been done in the English courts any creditor properly invoking our jurisdiction may acquire a lien upon such property by attachment or by judgment superior to any rights possessed by the English liquidator. (*Matter of Waite,* 99 N. Y. 433.)"

Similarly, in the leading case of *Clark* v. *Williard,* 294 U.S. 211 (1935), Mr. Justice Cardozo concluded (at p. 213):

> "Every state has jurisdiction to determine for itself the liability of property within its territorial

> limits to seizure and sale under the process of its courts."

He then went on to say (294 U.S. at 215) that a state is free to recognize the superior right of persons succeeding to the title of a bankrupt corporation pursuant to the laws of the jurisdiction where the bankrupt resides, or alternatively, that the state may

> "* * * give the local creditor a free hand, with the result that he may seize what he can find, though the assets of the debtor are dismembered in the process."*

To the same effect *see: Annotation, Local Property of Insolvent Foreign Corporation For Which a Liquidator or Receiver Has Been Appointed in Another State as Subject to Sequestration or Seizure Under Execution or Attachment,* 98 A.L.R. 351 (1935).

It is therefore patently unfair for IBB to characterize (at p. 6) as an "undue advantage" the attachment lien which Commonwealth has secured on certain of its New York assets. Such lien was acquired in good faith in reliance on the laws of the State of New York, as well as on literally dozens of cases approving such a procedure for aggrieved creditors of foreign corporations.

Whether or not IBB would be entitled to invoke New York law in order to obtain equal distribution of its New York assets is irrelevant to a determination of jurisdiction under the Act. By any reading, the federal law is not and cannot be the stopper which plugs up any supposed "gap" in

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* *See also* the previous decision of the Supreme Court in the same case, where Justice Cardozo says at 292 U.S. 112, 123-24:

> "[I]nsurance corporations, *like banks,* are excluded from bankruptcy altogether (11 U.S.C. § 22b) and must submit to dismemberment, however great the waste or inequality, unless receivers are appointed."

the state law whereby the treatment of local assets is less favorable to a debtor than that which would be accorded under the federal Act if it applied. In fact, however, New York does have elaborate statutory provisions dealing with foreign banking and insurance corporations. *See:* Banking Law, Sections 200 *et seq.*, Sections 605 *et seq.;* Insurance Law, Sections 515, 516. For a court to conclude that the federal Act applies generally to foreign banking corporations would therefore jeopardize the legitimacy of the New York statutes governing such foreign entities.* If fine distinctions are required in order to avoid preempting state legislation which has proved perfectly adequate in the past, then it is the proper role of the legislature, rather than the judiciary, to weigh precisely how and to what extent to achieve such preemption.

Even if IBB was not subject to banking regulation in the State of New York, it does not follow that New York is powerless to deal with the assets in this State belonging to an insolvent foreign banking corporation. As noted by Judge Lasker, Section 1202(a)(4) of the New York Business Corporation Law (B.C.L.) "presumably applies to IBB" (A 80). The cases cited by Judge Lasker in footnote 11 (A 88), decided under C.P.A. §977(b), the predecessor to B.C.L. §1202(4), are only two among literally dozens of cases in which state jurisdiction was asserted over local assets of foreign corporations, frequently foreign banking corporations, upon their nationalization or dissolution by foreign governments. In some of such cases, the facts coincided with the present facts, in that jurisdiction was

*IBB, while recognizing that in the State of New York certain foreign banking corporations are regulated by statutes, which also govern their liquidation, argues (at p. 38) that these statutes do not apply to it. By urging this distinction, IBB is apparently conceding that the banking corporation exception in Section 4 of the Act *does indeed apply to many foreign banking corporations.* What it in effect urges is that this Court permit its voluntary petition to stand by creating an exception to that exception.

asserted solely on the basis of assets located here, even though the foreign corporations did no banking business here.*

Furthermore, New York courts have inherent power to appoint a receiver over local assets of an insolvent foreign corporation, or to surrender assets of a liquidated foreign corporation to a statutory receiver appointed in the jurisdiction in which it was created. *See, e.g., State Bank of Pearl River* v. *Hudson Engineering & Tool Co.*, 280 App. Div. 805, 113 N.Y.S. 2d 345 (2d Dept. 1952); White, *New York Corporations* ¶1202.01 (1975).

IBB's complaint would therefore appear to be that its remedy in the state of New York is not as favorable to it as an adjudication in bankruptcy would be, because, under the ruling in *Clark* v. *Williard, supra*, and under the New York law, any rights of IBB might be subjected to the prior judgments of local creditors. But the supposed "objectives"—or, as IBB later terms it, at p. 42, the "general policy"—of the Bankruptcy Act cannot create preemptive federal bankruptcy jurisdiction in those areas from which it has been specifically excluded.

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*See e.g. *Urited States v. National City Bank of New York*, 90 F. Supp. 448 (S.D.N.Y. 1950) and *Steingut* v. *Guaranty Trust Co. of New York*, 58 F. Supp. 623 (S.D.N.Y. 1944), each involving the Russo-Asiatic Bank, which did no business in New York (90 F. Supp. at 450 and 58 F. Supp. at 634). In these cases, the rights of the New York receivers were found superseded by the federal policy expressed in the Litvinov Assignment, but the jurisdiction of the state courts was otherwise valid.

POINT II

Legislative history supports, if anything, the conclusion that the banking corporation exception applies to foreign, as well as to national and state, banking corporations.

As has been demonstrated in Point I, *supra,* the language of Section 4(a) of the Act specifically excludes banking corporations from its provisions for voluntary bankruptcy, regardless of whether such corporations are foreign or domestic. IBB's case in favor of bankruptcy jurisdiction is therefore premised, almost entirely, upon an analysis of the legislative history of that Section, in an attempt to demonstrate that the Act means something other than what it says.

The relevant portion of the Act of 1898 (Section 4, Act of July 1, 1898, 30 Stat. 544, 547), from which the present law has developed, originally read as follows:

> "(a) Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.
>
> "(b) Any natural person, * * * any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

IBB's argument that the exclusions contained in Section 4(a) of the present Act apply only to domestic corporations is built primarily on the reference made in

the second sentence of Section 4(b) of the 1898 Act to "national banks or banks incorporated under State or Territorial laws." However, as will be hereinafter demonstrated, this "bootstrap" argument is wholly without substance and finds no support whatever in the legislative history or congressional debates relating to the 1898 Act.

In any event, the language on which reliance has been placed was dropped entirely when the 1898 Act was amended in 1910. The wording of Section 4 of the 1910 Act makes it even clearer that in construing the exclusionary language contained therein, no logical distinction can be drawn between domestic and foreign corporations. The amended Section 4 reads as follows:

> "(a) Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.
>
> "(b) Any natural person * * * [and] any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, * * * may be adjudged an involuntary bankrupt * * * and shall be subject to the provisions and entitled to the benefits of this Act." (Act of June 25, 1910, 36 Stat. 838, 839).

A. Reference to legislative or statutory history may not, in this case, negate the obvious meaning of the words used in the statute.

Before embarking upon a detailed analysis of what Congress said about the Bankruptcy Act it adopted, it would be wise to review the appropriateness of such analysis, and the standards by which its significance is to be measured. The use of legislative history as an aid to statutory construction is one of those areas of the law in which the decisions are in chaotic disarray. Little ingenuity is required to produce a seemingly authoritative quotation in

support of either side of almost every propositon. Thus, the following observation made by Archibald Cox in his article entitled *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370 (1947), is extraordinarily perceptive:*

> "Moreover, overemphasis on legislative guides may lead to a distorted view of the statutory purpose no less than literalism, for much less thought is spent on the future implications of committee reports and explanations on the floor than in choosing the words of a statute * * *" (at p. 381).

To the same effect, *see Gemsco, Inc.* v. *Walling*, 324 U.S. 244 (1945), where it was said (at page 260):

> "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

As stated by Mr. Justice Reed in *United States* v. *American Trucking Associations*, 310 U.S. 534, 543 (1940):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."

Commonwealth does not deny that legislative history may, and often does, serve as a valuable aid in the construction of ambiguous statutory language. In the present case, however, there is no ambiguity in the language of the statute, and in fact, it is IBB's interpretation which would lead to an inconsistency. See pp. 6-8, *supra*. Reference to legislative history is therefore neither necessary nor

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* This portion of that article was very recently quoted with approval in *Schiaffo* v. *Helstoski*, 492 F.2d 413 at 428 (3rd Cir. 1974).

appropriate. *See:* 73 Am. Jur. 2d, Statutes § 194; 82 C.J.S., Statutes § 322 at pp. 577, 583-88.*

If reference is nevertheless made to legislative history, it should be in adherence to several rules which have received fairly uniform acceptance. One of these rules is that the remarks made in the course of debate by a single legislator are not a reliable guide to Congressional intent. *See: United States* v. *Beaver Run Coal Co.*, 99 F.2d 610 (3rd Cir. 1938), where the court said (at p. 613):

> "We can not gather the intention of Congress from the statements of a single member thereof (United States v. Trans-Missouri Freight Association, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007) but if we could, we would not be entitled to rewrite the statute to make it comply with his statements."

Accordingly, the inordinate emphasis which IBB places on the statements of Congressman Bodine, quoted at length at pages 12 through 14 of its brief, is misplaced. Congressman Bodine was neither the sponsor of the 1898 Act in the House nor even a member of the committee which drafted that legislation. And, as Dean Sovern points out in his scholarly article on Section 4 of the Bankruptcy Act, discussed at p. 36, *infra,* there is a distinct "lack of evidence in the history of section 4 that the rest of Congress shared Mr. Bodine's views" that banking and other corporations should be excluded because of the availability of alternative regulation.

Another well-recognized rule of statutory construction is that in order for legislative history to have any real mean-

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* It is there quite appropriately stated that: "An unambiguous statute must be given effect according to its plain and obvious meaning, and such unambiguous statute cannot be extended beyond its plain and obvious meaning, or restricted to, or confined in operation within, narrower limits or bounds than manifestly intended by the legislature, because of some supposed policy of the law, or because the legislature did not use proper words to express its meaning, otherwise the court would be assuming legislative authority."

ing, it must be shown that Congress in fact focused on the particular question, the resolution of which is being sought. In *Jewell Ridge Coal Corp.* v. *Local No. 6167,* 325 U.S. 161 (1945), the Supreme Court was called upon to construe a section of the Fair Labor Standards Act in a context to which Congressional attention had never been specifically directed. Speaking for the majority of the Court, Mr. Justice Murphy remarked (at pp. 168-169):

> "Statements in the legislative history to the effect that the Act was aimed primarily at overworked and underpaid workers and that the Act did not attempt to interfere with bona fide collective bargaining agreements are indecisive of the issue in the present case. *Such general remarks,* when read fairly and in light of their true context, *were obviously not made with this narrow issue in mind* * * *" (Emphasis added).

Other sections of the same statute were more recently under consideration in *Souder* v. *Brennan,* 367 F. Supp. 808 (D.D.C. 1973). The court there pointed out (at pp. 812-813):

> "Even where there is legislative history in point, albeit ambiguous or contradictory, it is unnecessary to refer to it and improper to allow such history to override the plain meaning of the statutory language. *Most certainly, then, the absence of any legislative history in point should not outweigh the words of the statute*" (Emphasis added).

It is in the light of such *caveats* that the purpose for consulting legislative history must be kept clearly in focus. In the present case, IBB attempts to prove that in adopting the exclusionary language of Section 4 of the Act, Congress intended to draw a distinction between its application to foreign and domestic corporations. However, IBB itself

reaches the very conclusion which defeats its own argument (at p. 42):

> "* * * Congress could not have had at the time of enactment the circumstances of the aforesaid banking corporation not engaged in banking operations in the United States specifically in mind when it drafted the 'banking corporation' exception and it is beyond cavil that no evidence can be adduced that it did."

In other words, IBB admits that Congress was entirely silent on the very issue which it must prove in order to persuade this Court to overrule the obvious meaning of the statutory language.

As Mr. Justice Douglas has so well put it: "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States,* 328 U.S. 61 at 69 (1946). A similar thought was expressed by this Court in a case where the contention was made that the *absence* of discussion on a particular point evidenced a Congressional intent to make no change in the preexisting law when an amendment thereto was adopted. *United States* v. *Goldsmith,* 108 F.2d 917 (2d Cir. 1940). In dismissing this contention, Judge Clark said (at p. 919):

> "In any event, such uncertain and at best *negative evidence of legislative purpose cannot serve to limit the clear statement of the new statute*" (Emphasis added).

Finally, it should be noted that the debates in Congress with respect to the adoption of Section 4 of the 1898 Act disclosed a wide disparity of views insofar as corporations were concerned. A significant change in the language of Section 4(b), adding the reference to "banks incorporated under State or Territorial laws," was made by the conference committee *without explanation.* When a like circumstance arose in *Trailmobile Co.* v. *Whirls,* 331 U.S. 40

(1947), which dealt with certain sections of the Selective Training and Service Act, Mr. Justice Rutledge very pertinently remarked (at p. 61):

> "Moreover, as has been noted, the most important committee changes relied upon were *made without explanation. The interpretation of statutes cannot* safely be made to rest upon mute intermediate legislative maneuvers" (Emphasis added).

If any one thing is clear from the legislative history of Section 4, it is that Congress never gave the slightest consideration, either in 1898 or in 1910, to treating foreign banking corporations any differently than domestic ones under the Act.

B. It is clear that at no time since 1898 has any banking corporation, foreign or domestic, been entitled to the benefits of voluntary bankruptcy.

The instant petition filed by IBB, being a voluntary one, is of the type which has since 1898 been regulated by Section 4(a) of the Act. Under the 1898 Act no such voluntary petition might be filed by *any* banking corporation, domestic or foreign. This was because no corporation of any kind was entitled to file a voluntary petition under Section 4(a) of that Act.

Perhaps, even in 1898, some ingenious lawyer might have argued that the words "except a corporation" as used in Section 4(a) applied only to domestic corporations, and have endeavored in that fashion to obtain for a foreign corporation benefits which Congress had denied to all domestic corporations. But the absurdity of such a result should serve as a warning against the interpretation which IBB now seeks for the words "banking corporation." For it is clear from the Congressional debates on the Act of 1898 that anti-corporate sentiment ran high. See pp. 25-28, *infra*. And, since the privilege of filing a volun-

tary bankruptcy petition was, by the terms of the statute, a "benefit" to the petitioner, the 1898 Congress would have been appalled by such a convoluted outcome.

The present wording of Section 4(a) is essentially that which was adopted in 1910—save for the 1932 amendment adding building and loan assocations to the list of excepted corporations. It is therefore significant that at the time the list of excepted corporations was added to Section 4(a), Section 4(b) no longer contained the reference to national or ~~state~~ banks which is emphasized in IBB's brief at pages 10 *et seq.* At no time were the words "national" or "national and State" or any other words used to qualify "banking corporation" as that term appears in Section 4(a). Thus, in the case of voluntary petitions, it has never been possible to argue that foreign banking corporations enjoyed a more favorable status under Section 4(a) than did domestic ones.

C. Even in the case of involuntary proceedings foreign banking corporations have never been subject to bankruptcy jurisdiction.

The legislative history of Section 4(b) dealing with involuntary proceedings is, perhaps, only tangentially relevant to an interpretation of Section 4(a). But even in the case of involuntary proceedings, banking corporations are, and since 1910 have been, *expressly* excluded from the provisions of the Act, without qualification. Any purported difference between the treatment to be accorded foreign, as distinguished from domestic, banking corporations must of necessity be predicated on the 1898 version of Section 4(b)—a Section which was substantially amended in 1910 by, among other things, omitting the reference to national and State banks which had previously been contained therein.

The basic premise of IBB's argument is that, prior to 1910, Section 4(b) contained language believed to be sus-

ceptible of creating a distinction between domestic and foreign banking corporations, and that the amendment of 1910 preserved that distinction, even though the amendatory language did not so provide. However, that premise falls of its own weight if *either* (1) the 1898 Act did not permit of the suggested distinction between a domestic and foreign banking corporation, *or* (2) the amendments to Section 4 made in 1910 did not incorporate that distinction, if indeed one previously existed. In fact, on either of these grounds, IBB's basic premise is demonstrably without merit.

1. *The Act of 1898 did not extend its benefits to any banking corporation, domestic or foreign, even in an involuntary proceeding.*

IBB attempts to make much of the so-called "private banker" clause of Section 4(b) of the 1898 Act, and its modification so as to exclude State and Territorial banks, as well as national banks. That clause provided that:

> "Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

Concededly, this sentence does make reference to national and state banks. It does so, however, not in contrast to foreign banks, but only in contrast to "private bankers."

As the term "private banker" was construed in the case law, it was intended merely to distinguish between individuals or firms, on the one hand, and corporations, on the other. *See: In re Surety Guaranty & Trust Co.*, 121 F. 73, 74 (7th Cir. 1902). But the terms "any natural person" and "any unincorporated company" appearing in the first sentence of Section 4(b) were already broad enough to embrace the term "private banker," so that the addition of the "private banker" clause added nothing of substance to the Act. At least one court pointed out that the entire

second sentence of Section 4(b) was in fact "superfluous," and that this is the reason the clause was dropped when the 1910 amendment to that Section was adopted. *In re Sage,* 224 F. 525, 537 (E.D. Mo. 1915), *aff'd sub nom. Missouri* v. *Angle,* 236 F. 644 (8th Cir. 1916).

In order to comprehend, if possible, why such a redundant clause was included in the Act at all, or, for that matter, why the rest of the language of Section 4 was adopted in its 1898 form, it is first necessary to consider the context in which Congress acted. The last bankruptcy act had been enacted in 1867,* and had provided simply for the bankruptcy of "any moneyed business or commercial corporation," without any enumerated exceptions. During the eleven years that the 1867 Act remained in effect, however, there had evolved a substantial body of judicial authority construing the scope and meaning of that phrase, creating a gloss on the statutory language.

Insofar as national banks were concerned, it had been held under the 1867 Act that they were not subject to bankruptcy proceedings. *In re Manufacturers' National Bank,* 16 Fed. Cas. 665 (No. 9,051) (N.D. Ill. 1873).** A state bank, on the other hand, was held to be clearly subject to the Act. *Thornhill* v. *Bank of Louisiana,* 23 Fed. Cas. 1139 (No. 13,992) (C.C.D. La. 1870), *appeal dismissed sub nom. Morgan* v. *Thornhill,* 78 U.S. (11 Wall.) 65 (1870). Similarly, there were numerous cases holding that *railroad* corporations might be declared bankrupts. *E.g. Sweatt* v. *Boston H. & E. R. Co.,* 23 Fed. Cas. 530 (No. 13,684) (C.C.D.

* 14 Stat. 517 (1867). Like its two predecessors, however, dissatisfaction with the administration of its provisions led to its repeal by Act of June 7, 1878 (20 Stat. 99). It had continued in force for a period longer than its two predecessors combined, the Act of 1800 having been repealed in 1803 (2 Stat. 248), and the 1841 Act in 1843 (5 Stat. 614).

** In arriving at that conclusion the court was influenced in large measure by the fact that subsequent to the enactment of the Bankruptcy Act of 1867, Congress had adopted several amendments to the National Bank Act (16 Fed. Cas. at 669).

Mass. 1871).* Like holdings existed under the 1867 Act with respect to *insurance* corporations, which were considered to be either "business" or "commercial" ventures as those terms were used in the statute. *In re Hercules Mutual Life Assur. Society*, 12 Fed. Cas. 12 (No. 6,402) (S.D.N.Y. 1872); *In re Independent Ins. Co.*, 13 Fed. Cas. 13 (No. 7,017) (C.C.D. Mass. 1872).

The bill which was originally proposed on the floor of the Senate in 1897 and on the floor of the House in 1898 read as follows (H.R. Rep. No. 65, 55th Cong., 2d Sess., to accompany S. 1035):

> "Any person [including a corporation] owing debts to the amount of one thousand dollars or over, if adjudged an involuntary bankrupt upon an impartial trial, shall be subject to the provisions of this Act except * * * a national bank * * *."

Quite logically, the specific exclusion of only national banks represented a statutory adoption of the rationale of *Manufacturers' National Bank, supra,* and was intended merely to avoid implicitly repealing the National Bank Act, while nonetheless retaining bankruptcy jurisdiction over all other corporations.

It was in explanation of the bankruptcy bill in *this* form that the House Report and Senator Lindsey, quoted by IBB at pages 11-12, referred to the existence of a satisfactory law for the control and liquidation of national banks. The bill, however, was never enacted into law in that form.

A lengthy debate ensued in both houses of Congress, over many months, among those factions who wanted no bankruptcy law at all; those who wanted a bankruptcy law, but only for individuals; and those who wanted a bank-

**Sweatt* is by far the most comprehensive opinion construing the phrase "any moneyed business or commercial corporation" as used in the 1867 Act. Among other things, it recognized, by way of dictum, that a *municipal corporation*, not being a corporation conducted for profit, could not be embraced by that phrase (23 Fed. Cas. at 534).

ruptcy law for corporations and individuals alike. Some of the flavor of the debate can be gleaned from the comments of two Senators on April 20 and April 21, 1897.

Senator Turpie, in attacking the original bill, stated at 30 Cong. Rec. 787-89, 55th Cong., 1st Sess. (1897):

> "For my part, sir, I do not think, with respect to a very large class of corporations, that they ought to be included in any such act. * * * [A] man who becomes subject to misfortune * * * should be taken out and a way of escape offered. * * *
>
> "* * * [But] it never was the intention that it should apply to incorporated companies."

Senator Hoar, in response, made the following observation at 30 Cong. Rec. 788-89, 55th Cong., 1st Sess (1897):

> "But there is a class of corporations which has become * * * very common, and which it seems to me ought to be included in the liability to involuntary proceedings, and that is the class which are familiarly spoken of as joint stock companies. I suppose, without being sure, that probably four-fifths of the manufacturing and trading business of the New England States * * * is now conducted by this class of corporations. * * *
>
> "So I think that this bill ought to include and rightfully does include that kind of corporations * * *."

After further discussion, Senator Hoar proposed an amendment which would limit the definition of "corporation" in the Act to include only "a body doing business as a merchant, broker, banker, trader, manufacturer, or miner." Senator Turpie objected to the inclusion of even these corporations, but admitted that the amendment was "a concession" to his objections. 30 Cong. Rec. at 789. The proposed amendment, after further discussion, was thereupon adopted.

Even this compromise form of the bill did not pass the Senate, however. On April 22, Senator Nelson proposed an altered bill which excluded corporations entirely from the involuntary bankruptcy provisions. He stated, 30 Cong. Rec. at 799:

> "The effect of these amendments is to exclude corporations. They are designed to meet the objections made by the Senator from Indiana [Mr. Turpie] yesterday. Corporations can be wound up through other mediums than through bankruptcy proceedings."

The amendment by Senator Nelson was adopted, and it was the bill in this form that passed the Senate. 30 Cong. Rec. at 801.

The bill reported to the House in 1898 reverted to the original Senate bill, which had included all corporations except national banks. It was in criticizing the bill in *this* form that Congressman Bodine made the statements quoted at length in IBB's brief at pp. 12-14. Among other things, Congressman Bodine, while objecting to the inclusion of corporations generally, stated, in language closely paralleling that of Senator Hoar (31 Cong. Rec. at 1939):

> "It may be that there is a certain class of corporation that are as appropriately made subject to its provisions as are natural persons. I refer to those engaged in mining, manufacturing, merchandising, trading, and the buying and selling of property of any kind, and, in fine, engage in any business of the same kind as that usually carried on by individuals."

Despite Congressman Bodine's comments, the bill passed the House in the form originally proposed, including all corporations except national banks.

It was therefore up to the conference committee to work out the compromise between the Senate version of the bill, excluding all corporations, and the House version, includ-

ing all corporations except national banks. The compromise was to include only certain specified corporations, essentially those proposed by Senator Hoar and Congressman Bodine, that is, those engaged "principally in manufacturing, trading, printing, publishing, or mercantile pursuits." The redundant "private banker" clause was also added, but without explanation of any kind.

With this understanding of the Congressional setting in 1898, it is appropriate to turn to the question of determining the purpose for the Section 4 exclusions. As evidenced by the pages on pages of anti-corporate sentiment contained in the Congressional debate on the 1898 Act, and by such statements as those of Congressman Bodine that the corporations to be allowed involuntary bankruptcy treatment should be limited to those which carry on the same kind of business "as that usually carried on by *individuals*," it is clear that far more was in the minds of the legislators than the alternate regulation of banks. That might have been sufficient reason for excluding them had they been the only excluded corporations, but cannot explain the exclusion of all of the exempt corporations.

To exclude only national banks, as the original bill proposed, would have been to adopt essentially the same scheme as that contained in the 1867 Act. This the Congress chose not to do. Rather, the language as adopted represents a carefully considered compromise between the corporate and anti-corporate forces, which compromise should not lightly be altered by an overemphasis of any one specific factor which may have motivated the legislators, but which the legislative record does not clearly reveal.

The second sentence of Section 4(b) of the 1898 Act represented, if anything, an attempt to make clear that the distinction for jurisdictional purposes would turn on whether the alleged bankrupt was or was not incorporated. It would be hopelessly exaggerating the clairvoyance of Congress to suggest that in thus distinguishing between

unincorporated "private bankers" and national or state banking corporations, it was giving any consideration whatever to permitting a *foreign* banking corporation to become the subject of involuntary bankruptcy proceedings. In any event, the reference to State and Territorial, in addition to national, banks was added for the purpose of expanding the scope of the banking corporation exception, not for the purpose of limiting that exception.

Whether or not the second sentence of Section 4(b) was entirely superfluous, as the *Sage* case, *supra,* suggests, primary reference must nonetheless be made to the first sentence which listed the *only* types of corporations then subject to involuntary proceedings. That a banking corporation, whether foreign or not, could not possibly qualify as one of the included corporations is clear, for the relevant portion of Section 4(b) as finally adopted in 1898 provided that:

> "* * * any corporation *engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits* * * * may be adjudged an involuntary bankrupt * * *" (30 Stat. 544, 547).

As the phrase "manufacturing, trading, printing, publishing, or mercantile pursuits" was understood in 1898, no banking corporation would have qualified for inclusion therein. Of course, no case expressly so holds, since all cases involving state and federal banks could be more readily disposed of by reference to the second sentence of the Section, and no cases involving a foreign bank ever arose. But the listed corporations susceptible to involuntary bankruptcy were always understood to include *only* corporations involved in the buying and selling of goods, as is reflected by the comments of Senators Turpie and Hoar, discussed *supra.*

The cases bear out this interpretation of the language. For example, in *In re Surety Guaranty & Trust Co.,* 121

F.73 (7th Cir. 1902), the court held that a dealer in stocks, bonds, and other securities did not qualify as one of the included corporations. The court answers its own inquiry at 74-75:

> "Is the buying and selling of stocks, bonds, and other securities a 'trade pursuit' within the meaning of the bankruptcy act? In a popular sense trade comprehends every species of exchange or dealing. It is, however, chiefly used to denote barter by purchase and sale of goods, wares, and merchandise, either at wholesale or at retail.* * * We are inclined to hold that Congress employed the words 'trader' and 'mercantile pursuits' in the technical sense by which they were known to the law. If it be desirable that the provisions of the act should be extended to include the business of dealing in stocks and bonds, which now engages the time of many people, it must come about by legislative action, and not by the act of the court in enlarging the technical meaning of a term long known to and well defined in the law."

See also: In re Kingston Realty Co., 160 F. 445 (2d Cir. 1908); *In re New York & New Jersey Ice Lines,* 147 F. 214 (2d Cir. 1906); *Zugalla* v. *International Mercantile Agency,* 142 F. 927 (3rd Cir. 1906); *In re New York Building-Loan Banking Co.,* 127 F. 471 (S.D.N.Y. 1904). Given this limited concept of what constituted a trade or mercantile pursuit, it is apparent that no banking corporation could have qualified for the limited application of involuntary bankruptcy proceedings even in 1898.

In summary, it is clear that the purpose of the compromise language of the 1898 Act was not to defer to alternate regulation of the excluded corporations, but rather represented a value judgment by Congress, as a compromise—between those who wanted all corporations and those who wanted no corporations to be amenable to involuntary proceedings—with respect to what types of corporations, *by their nature,* should be extended federal bankruptcy protection.

2. *The amendment of 1910 did not include banking corporations, either domestic or foreign, within the class of corporations subject to involuntary bankruptcy.*

In 1910, the wording of Section 4(b), governing involuntary bankruptcy, was changed from the inclusive "any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits"* to the exclusive "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation." The phrase "any moneyed, business, or commercial corporation" was taken from the language of the 1867 Act.

At the same time, the entire second sentence of Section 4(b) as it had appeared in the 1898 Act was eliminated. The 1910 amendment also for the first time allowed the voluntary bankruptcy of corporations, but those corporations excluded by the new language of Section 4(b) were likewise excluded under Section 4(a). This new language, while possibly expanding the types of corporation subject to bankruptcy, was nonetheless designed to preserve the exemption for banking and other public or quasi public corporations which had previously existed.

The reason for the change of language was partly founded in Congress' dissatisfaction with the case law interpreting the 1898 language. As stated in the House Report to the 1910 bill, H.R. Rep. No. 511, 61st Cong., 2d Sess. (1910), at pp. 4-5:

> "This section * * * in short * * * would enact the rule and express the exception rather than enact the exception, as the present law did.
>
> "The books are already filled with cases construing the meaning of the clause in the present law * * * and some very amazing distinctions have been made. * * *

* Mining corporations had been added to the list of included corporations in 1903 (32 Stat. 797).

> "The words substituted are taken from the bankruptcy law of 1867, and their meaning has long since been settled by the courts."

Because the 1898 Act was intentionally made so restrictive in scope insofar as corporations were concerned, it had been a relatively simple matter to exclude municipal, railroad, insurance and banking corporations, both domestic and foreign, from its operation without the necessity of even naming them. But when Congress decided in 1910 to expand the application of Section 4 to corporations generally and to adopt the clearer "scientific classification" described by Congressman Sherley (45 Cong. Rec. at 2275), it became essential to identify specifically the excluded corporations. This was done by incorporating into both Sections 4(a) and 4(b) the unambiguous expression "except a municipal, railroad, insurance, or banking corporation." As an integral part of that exception, the term "banking corporation" was used in the generic sense, and in no way owed its derivation to the phrase "national banks or banks incorporated under State or Territorial laws" which had been used in the "private banker" clause of Section 4(b) of the 1898 Act. In this fashion the Congressional intent to exclude from bankruptcy all banking corporations, be they domestic or foreign, which had been inaugurated with the 1898 Act, was carried forward into and made part of the 1910 Act.

It was in this context, and with the clear understanding that banking corporations, among others, were already excluded from the provisions of the Act, that Congressman Sherley, whose remarks are quoted in IBB's brief at pp. 16-17, was able to reassure Congress that the altered wording did not effect any change with respect to the excepted corporations. Congressman Sherley's explanation of the bill during the hearing before Subcommittee No. 1

of the Committee on the Judiciary on H.R. 18694 (Bankruptcy), Feb. 3, 1909 reads as follows:

> "*There has been excepted out of the law always* certain corporations—for instance, municipal, railroad, insurance, or *banking corporations*—on the theory that all of those corporations partook either of a public or quasi-public nature that did not warrant their estates being adjudicated through bankruptcy proceedings, and that it was wiser to hold them exempt from the law than to permit them to be thrown into bankruptcy by either voluntary or involuntary proceedings. This amendment does not, *in that particular*, change the law at all. Now these particular corporations are exempted. What is here proposed is to permit the voluntary filing of a petition by a corporation." (Emphasis added.)

By spelling out the express exceptions in unequivocal and unqualified terms, Congress made it even clearer in 1910 than it had in 1898 that *all* banking corporations were to be exempted from bankruptcy jurisdiction, without any distinction between domestic and foreign banking corporations. Had there been the slightest desire to extend different treatment to *foreign* banking corporations, Congress could, and almost certainly would, have said so when it undertook the substantial revisions to Section 4 of the Act which were made in 1910.

D. There is no persuasive reason to believe that in adopting the banking corporation exception Congress was particularly motivated by the existence of alternative regulation in the form of federal or state supervision.

IBB attempts to prove that the reason for the banking corporation exception is the presumed availability of alternative federal or state regulation (pp. 11 *et seq.*), and suggests that where, under the facts of a particular case, such

alternative regulation is unavailable, federal courts have license to invoke federal bankruptcy jurisdiction. Such a proposition is without merit.

At the outset, it is perfectly apparent that the Act makes no specific reference to the concept of "alternative regulation" in listing the types of corporations which are expressly excluded from bankruptcy jurisdiction. Likewise, legislative history reveals that Congress paid no particular attention to whether or not there was adequate state or federal regulation of the excepted corporations. Thus, we find instances where the exclusion has been applied even though it was found that no special state regulation in fact existed. Conversely, there are at least an equal number of instances where no exclusion was found to exist, even though adequate state regulation was in fact available.

It is simply unrealistic, therefore, to conclude that the availability of "alternative regulation" is the talisman which provides the answer to the knotty question of legislative intent. There were a variety of reasons why Congress excepted banks and certain other corporations from coverage by the Act, and to place exclusive emphasis on the "alternative regulation" theory is not only contrary to the contemporary historical record, but disregards the other valid reasons which motivated Congress in adopting these exclusions.

1. *Exclusion has been found where no alternative regulation exists, as well as inclusion where it does exist.*

In *In re Oregon Trust & Savings Bank,* 156 F. 319 (D. Oregon 1907), the absence of state banking regulations was specifically held to be an irrelevant consideration in determining whether a banking corporation was excluded from the operation of the Bankruptcy Act. The court in that case concluded (at page 320):

> "Under the statutes of the state of Oregon provisions are made for forming corporations, and by virtue of such laws, therefore, corporations might be and are frequently formed for carrying on a banking business. The organization of banks, therefore, comes within the purview of the statutes, and *it does not seem to me that it makes any difference* as to the effect of the law that no particular laws were made until recently for the regulation of banks organized under the laws of the state. The banks are, nevertheless, organized for the purpose of carrying on a banking business, and hence such corporations come within the intendment of that clause of the bankruptcy act which has been heretofore alluded to, and therefore are not subject to be adjudged involuntary bankrupts" (emphasis added).

Similarly, when Congress in 1932 decided to add building and loan associations to the list of corporations specifically excepted from the Act, it was evident that the existence or non-existence of alternative federal or state regulation was an irrelevant consideration for such purpose. In the House Report on the bill which was eventually adopted, the Committee stated (H.R. Rep. No. 98, 72nd Cong., 1st Sess., 1932):

> "[I]t has been suggested that by reason of the fact that in two States in the Union no law exists controlling building and loan associations that this might be a reason for not exempting these associations from the operation of the bankruptcy law. It will be remembered that if the bankruptcy law is not invoked in connection with building and loan associations that this in no way interferes with the State equity laws and whether a State has supervisory control over building and loan associations or not those interested may at all times take advantage of State insolvency laws. Building and loan associations are of a peculiar nature, associations functioning almost exclusively in local communities. The deposits received are from local depositors and the securities taken are local securities. Therefore, it seems

> the part of wisdom to leave the administration of these matters in the local courts" (at pp. 1-2).

Michael Sovern, the present Dean of Columbia University School of Law, is one of the few legal scholars to give any serious consideration to the reasons for the exclusions from the Act which are set forth in Section 4 thereof. Sovern, *Section 4 of the Bankrupicy Act: The Excluded Corporations,* 42 Minn. L. Rev. 171 (1957). In concluding that there is at best only "slight support" for the "alternative regulation" theory, the author points out (at pp. 180-181):

> "* * * It might be argued that Congress left the insolvency administration of banking and insurance corporations and building and loan associations to state law for the reason suggested by Mr. Bodine, that '[I]n nearly every State in the Union there are chapters on chapters of the statutes regulating to the smallest minutia the proceedings in case of the insolvency of any of those classes of corporations.' * * * *The argument suffers badly from the lack of evidence in the history of section 4 that the rest of Congress shared Mr. Bodine's views.* There is slight support in the deliberations preceding the passage of the Act of 1898, and in the debate preceding the exemption of building and loan associations, but hardly enough to sustain the proposition that Congress excluded banks, insurance corporations and building and loan associations primarily because they were so extensively regulated by the states. The argument suffers, too, from Congress' failure to exclude all closely regulated enterprises from bankruptcy."

As Dean Sovern suggests in the final sentence, under Section 4 of the Act federal bankruptcy jurisdiction may in fact interfere with areas where state regulation exists. For example, public utilities and public service companies, particularly gas and electric companies, have since 1910

been amenable to adjudication in bankruptcy on a voluntary or involuntary petition, despite their close regulation by the states. *See* 9 Am.Jur. 2d, Bankruptcy §§ 112, 134.

In like vein, insofar as "private bankers" were concerned, the federal bankruptcy scheme *did* in fact interfere with state regulation under the 1898 Act. For example, in *In re Salmon & Salmon,* 143 F. 395 (W.D. Mo. 1906), an attempt by the state to regulate the winding up of a private bank owned by a partnership was held to be precluded by the federal Bankruptcy Act. The court there said (at p. 404):

> "It was * * * the province of the Legislature, in so far as state corporate banks are concerned, to provide the exclusive manner designated in the act in question to wind up the affairs of such banks, dispose of its assets, and distribute the proceeds to the creditors justly entitled thereto, because such banks are not within the scope or purview of the national bankrupt act.
>
> "But the question here is, can the special judicial proceeding provided for in the act in question, for the winding up of the affairs of a banking concern, be given operation and effect as to private banks which are expressly within the scope and jurisdiction of the national bankrupt act, and is such power reserved in the state? I think not."

Likewise, in *State of Missouri* v. *Angle,* 236 F. 644 (8th Cir. 1916) it was held that the existence of federal bankruptcy jurisdiction precluded the state's assertion of jurisdiction over private banks. *See also*: *In re Faour,* 72 F. 2d 719 (2d Cir. 1934), *cert. denied,* 293 U.S. 613 (1934); *In re Bajardi,* 9 F. 2d 797 (2d Cir. 1926), *cert. denied,* 270 U.S. 651 (1926).

If "alternative regulation" were to be the sole criterion for determining whether or not to create an exception, then Congress might well have exempted *all* corporations

from bankruptcy, as many Congressmen argued should be the case in 1898. All corporations are, by definition, subject to regulation by the laws of their place of incorporation, so that state regulation *per se* cannot serve as the true test for determining which corporations are to come within the exceptions to the Act.

That Congress, had it so desired, might have adopted "alternative regulation" as the test for determining which corporations would be excluded from the Act is demonstrated by a similar exception to jurisdiction contained in Section 5(a)(6) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(6). That section provides for Commission jurisdiction over

> "[P]ersons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations in so far as they are subject to the Packers and Stockyards Act, 1921, as amended * * *."

Thus, while Congress specifically adopted for common carriers, air carriers, and persons subject to the Packers and Stockyards Act a test based upon "alternative regulation," it did not so qualify the exception for banks. Congress must have thought, just as in the case of bankruptcy, that the nature of a bank is such as to warrant an exception, whether or not "alternative regulation" exists in any particular case.

In short, if "alternative regulation" were the test by which exclusion from the Bankruptcy Act was to be determined, Congress would have framed its exceptions so as to make bankruptcy available only in those cases where state or federal regulation was inadequate. This Congress did not do. Rather, it drew the line of demarcation elsewhere, primarily between incorporated and unincorporated bodies.

The cases cited by IBB at pp. 22-27, primarily in support of the proposition that alternative regulation was the criterion for determining jurisdiction in bankruptcy, are inapposite. The real issue in each of these cases, except the *Equity Funding* case, was whether the nature of a corporation claimed to be exempt from the Bankruptcy Act should be determined by resort to state classification, or by independent characterization of the Bankruptcy Court itself. They reach no consensus on this point, but rather arrive at different conclusions concerning the definitional source.

For example, in *Union Guarantee & Mortgage Co.* v. *Van Schaick*, 75 F. 2d 984 (2d Cir. 1935), *cert. denied*, 296 U.S. 594 (1935), this Court adopted the state characterization test, saying (75 F.2d at 985):

> "When Congress excepted not all companies affected with a public interest, but specified kinds of such company, presumably it intended the states to define the kinds.
>
> "Thus we have no occasion to decide whether the debtor at bar ought not to have been incorporated under the New York Insurance law and regulated as such * * *. The state has chosen to regard it so, and that is all we may ask."

On the other hand, in *In re Prudence Co., Inc.*, 10 F. Supp. 33 (E.D.N.Y. 1935), the court held that the action of a state superintendent of banking in taking possession of the company's assets did not preclude the officers or directors of the company from thereafter filing a voluntary petition in bankruptcy. That court deemed the state definition of a corporation not to be determinative of amenability to federal bankruptcy, saying (10 F. Supp. at 41):

> "It is clear, however, that even if the state through legislative enactment declared the debtor a 'banking' corporation exempt from the Bankruptcy Act, this could have no controlling force in the determination of its status under the act. State classification was

> not regarded, not intended to be followed, for the language of the federal statute used to define the subject of bankruptcy speaks to the entire territory over which Congress has legislative jurisdiction, and means the same thing everywhere."

See also: Woolsey v. *Security Trust Co.*, 74 F.2d 334 (5th Cir. 1934), where the court relied primarily upon an analysis of the corporation's powers as set forth in its charter; *In re Bay Cities Guaranty Building-Loan Ass'n*, 48 F.2d 623 (S.D. Cal. 1931), where the court referred to the powers conferred by state law, but relied principally on independent characterization: *Gamble* v. *Daniel, supra,* saying, 39 F.2d at 450:

> "When Congress spoke of 'banking corporations' it spoke as of 1910. It used the words in no technical nor special sense, but as they were then ordinarily understood."

For a general discussion of this entire question, *see* Collier on Bankruptcy ¶4.05 (1974); Sovern, *supra,* 42 Minn. L. Rev. at 182-207; *Annotation, What is a Bank or Banking Corporation Within Exemption Provision of Bankruptcy Act,* 97 A.L.R. 1087 (1935).

Similarly, *In re Equity Funding Corp.*, 396 F. Supp. 1266 (C. D. Cal. 1975) is distinguishable. That case reaffirmed that an insurance company could not avail itself of the benefits of the Act by filing a petition for bankruptcy, although, having acquired jurisdiction over one entity (Equity Funding), a Bankruptcy Court, in furtherance of its jurisdiction under Section 2(a)(15) of the Act, might enjoin claims against its subsidiary (Bankers National Life Insurance Co.), even though the subsidiary was an insurance corporation.

Thus, none of the cited cases involved a fact situation analogous to the case at bar, or considered the question of whether the exclusions to jurisdiction under the Act extend

to foreign corporations. What IBB has in effect done is to quote extensively language which the courts used in determining exclusion from the Bankruptcy Act for the corporations there involved, in the hope that, by emphasizing the fortuitous use of the words "state" and "national," this same language may be used to draw distinctions in situations which were wholly unanticipated when those cases were decided.

To so interpret language out of its original context is to fly in the face of a maxim long known to the law. As stated by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821), quoted with approval in *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 269 (1937):

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Thus, even where a court makes specific application of a rule to a situation not at issue before it, by way of analogy or otherwise, that application is considered *dictum* and not controlling. Where, as here, the courts have used words not even remotely anticipating the fine distinctions which might conceivably be read into them, it is fitting and proper that the maxim be most strictly applied.

2. *Other equally valid reasons motivated Congress in excluding banking corporations from the Act.*

It is a patent oversimplification to conclude that the only reason for excluding banking corporations from bankruptcy jurisdiction is to be found in the alternative regulation purportedly available for the excepted corporations. Viewed in its proper context the exclusion of certain specified cor-

porations from the Act represented a Congressional compromise between those Congressmen who wanted more extensive bankruptcy laws and those who were strongly opposed to allowing any corporation the benefits of bankruptcy. *See* pp. 25-28, *supra*. To ascribe to Congress, decades after the event, an intent to exclude *only* those corporations which were subject to other federal or state regulation would therefore be to tamper with a solution which Congress itself worked out by a carefully considered process of compromise.

Furthermore, even the cases cited by IBB evidence other reasons for the Section 4 exclusions, or demonstrate that in fact no particluar reasons can be found. For example, in the case of *In re Supreme Lodge of the Mason's Annuity*, 286 F. 180 (N.D. Ga. 1923) the court considered the reasons for the exceptions listed in Section 4 of the Act. After concluding (at p. 184) that "*No reasons* for making these exceptions were assigned by the committees of Congress," the court went on to suggest four possible motivations in the following language:

(1) "* * * the public or quasi public nature of the business, involving other interests than those of creditors";

(2) "the desirability of unarrested operation";

(3) "the completeness of state regulation, including provisions for insolvency"; and

(4) "the inappropriateness of the bankruptcy machinery to their affairs."

True, a number of decisions have invoked the third of the foregoing reasons as explaining the exclusionary language contained in Section 4, and none more forcefully than *Woolsey* v. *Security Trust Co.*, 74 F.2d 334, 337 (5th Cir. 1934). But it must be remembered that in that case, and in other similar cases, the court was dealing with an involuntary petition filed against a state banking corporation in fact already the subject of a state receivership pro-

ceeding. Under these circumstances, reliance on the "alternative regulation" theory was the easiest and most readily available ground on which to dismiss the petition. It is, however, a far cry to carry over and attempt to apply language, which may have been appropriate to the simplistic fact pattern presented by the *Woolsey* case, to the instant situation involving, as it does, the filing by a *foreign* banking corporation of a *voluntary* petition under circumstances with which no previous court has ever grappled and which Congress itself never anticipated.

In connection with the last reason enumerated by the court in the *Mason's Annuity* case, *supra,* and emphasized by Judge Lasker in his opinion (A 81-83), it should be noted that the bankruptcy machinery anticipates cooperation among creditors, claims being settled more or less by agreement among creditors at meetings established for that purpose. Such a democratic machinery is ill suited to the winding up of the affairs of a bank, in which there are necessarily hundreds and sometimes even thousands of small creditors, the vast majority of whom have deposited funds with the bank.* Creditors' meetings attended by such a horde would be nothing short of a farce, and, recognizing this fact, Congress exhibited considerable wisdom and practicality by excluding all banks, without qualification, from the operation of the Act.

Careful analysis of the relevant legislative history and a reading of the myriad of decisions dealing with the excepted corporations mentioned in Section 4 all leads back to the conclusion that no reason—certainly no *one* reason—

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* IBB fails to point out that a foreign creditor may not only file a claim in bankruptcy, but may even initiate an involuntary proceeding. In fact, encouraged by the restrictive interpretation which Judge Galgay had placed on the banking corporation exception to Section 4 (a) of the Act, an involuntary proceeding has been filed by three *non-resident aliens* against yet another foreign banking corporation. *See: In re Israel-British Bank B.M. Tel-Aviv,* No. 74 B 1635 (S.D.N.Y.).

can be given to explain the action which Congress saw fit to take in limiting in certain specified instances the bankruptcy jurisdiction of the federal courts. Nowhere is this more lucidly demonstrated than in Dean Sovern's incisive article at 42 Minn. L. Rev. 171, to which reference has previously been made. At pages 181-182 he aptly points out:

> "It is, of course, possible, perhaps even probable, that banks, insurance corporations and building and loan associations were not all excluded from bankruptcy for the same reasons. It is possible, too, that Congress had no more definite reason than a reluctance to bring such crucial financial institutions within the purview of a statute aimed primarily at liquidation, but preferred to leave them under the aegis of the states and to courts of equity, where rehabilitation would at least be a possibility. However, the failure of the Chandler Act to make reorganization available to the excluded corporations indicates that, whatever the earlier view of Congress, it was not moved by this consideration in 1938. It is also possible that the members of Congress had no particular alternative remedy in mind, but simply did not wish to include corporations so important to our economy under a statute which permitted liquidation, and later reorganization, to be compelled in the event of insolvency by so unrepresentative a group as three creditors. In that event, though, it would not have been necessary to exclude them from voluntary as well as from involuntary bankruptcy.
>
> "*Whatever purposes Congress may have intended to achieve by excluding banking and insurance corporations and building and loan associations from bankruptcy, the legislative history of section 4 does not clearly reveal them*" (Emphasis added).

Since even IBB agrees (at p. 42) that "no evidence can be adduced" that Congress had in mind any distinction for the treatment of foreign banking corporations, and since

the alternative regulation test, upon which it seeks to construct a theory which would allow such a distinction, likewise finds no support in the legislative history, we are left precisely where we began: the words of the statute must be applied as they read. And, as demonstrated in Point I, *supra,* the words of the statute compel the conclusion that no banking corporation, either domestic or foreign, may file a voluntary petition under the Bankruptcy Act.

CONCLUSION

For the reasons set forth above, the decision and order appealed from should be affirmed.

Respectfully submitted,

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